Supreme Court, U. S.
FILED
SEP 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-456

NORTH AMERICAN ACCEPTANCE CORPORATION SECURITIES CASES

ARNALL, GOLDEN & GREGORY and TOUCHE ROSS & CO.,

Petitioners,

v.

SMITH, COHEN, RINGEL, KOHLER & MARTIN and BARTHOLD & MCGUIRE,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT–

1. The Second, Third, Fourth, Fifth, Seventh, Eighth and Tenth Circuits Are in Conflict with the Sixth, Ninth and District of Columbia Circuits over the Question Whether the Denial of a Motion to Disqualify Counsel Is a "Final Decision" Within the Meaning of 28 U.S.C. §1291 7

2. The Fifth Circuit, by Focusing on the Class Aspect of this Case as the Basis for its Denial of Appealability under 28 U.S.C. §1291, Is in Conflict with the Decisions of the Second and Third Circuits in *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) and *Kramer* v. *Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir.), *cert. denied*, 429 U.S. 830 (1976) 10

3. The Fifth Circuit Has Improperly Applied this Court's Decision in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949) 13

4. The Fifth Circuit's Decision Raises Important Questions Regarding the Role of the Courts of Appeals in the Timely Enforcement of the Ethical Obligations of Counsel under the Code of Professional Responsibility 17

CONCLUSION 19

APPENDIX

Appendix I—Judgment and Opinion of the Fifth Circuit 1a

Page

Appendix II—Opinion of the Fifth Circuit Denying Rehearing and Rehearing En Banc 8a

Appendix III—Order of the United States District Court for the Northern District of Georgia 10a

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES:

Abney v. *United States*, 431 U.S. 651 (1977)..... 7

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 6, 7, 11, 12, 13, 14, 15, 16

Community Broadcasting of Boston, Inc. v. *F.C.C.*, 546 F.2d 1022 (D.C. Cir. 1976)..... 9

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) .. 6, 8, 10, 13, 14

Cord v. *Smith*, 338 F.2d 516 (9th Cir. 1964), *clarified*, 370 F.2d 418 (9th Cir. 1966)..... 9

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) ... 7, 14

Fred Weber, Inc. v. *Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978)..... 8, 9

Fullmer v. *Harper*, 517 F.2d 20 (10th Cir. 1975) 9

General Motors Corp. v. *City of New York*, 501 F.2d 639 (2nd Cir. 1974)..... 8, 10, 11

Gonzales v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973)..... 16

Hall v. *Cole*, 412 U.S. 1 (1973) 18

Kramer v. *Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir.), *cert. denied*, 429 U.S. 830 (1976).... 8, 10, 11, 12

MacKethan v. *Peat, Marwick, Mitchell & Co.*, 557 F.2d 395 (4th Cir. 1977) 8

Melamed v. *ITT Continental Baking Co.*, 529 F.2d 290 (6th Cir. 1979)..... 9

National Socialist Party v. *Skokie*, 432 U.S. 43 (1977) 8

Page

Schloetter v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976)..... 8-9

Silver Chrysler Plymouth, Inc. v. *Chrysler Motors Corp.*, 496 F.2d 800 (2nd Cir. 1974) (*en banc*) 8

Stack v. *Boyle*, 342 U.S. 1 (1951) 7

Tomlinson v. *Florida Iron and Metal, Inc.*, 291 F.2d 333 (5th Cir. 1961) 8

Trone v. *Smith*, 553 F.2d 1207 (9th Cir. 1977)..... 9

United States v. *MacDonnald*, 435 U.S. 850 (1978), *cert. denied*, ___ U.S. ___, 99 S. Ct. 1504 (1979).. 8

Westinghouse Elec. Corp. v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 353 (1978) 8

Woods v. *Covington Cty. Bank*, 537 F.2d 804 (5th Cir. 1976)..... 8, 11

STATUTES:

28 U.S.C. §1254(a)..... 2

28 U.S.C. §1291 ..... *passim*

28 U.S.C. §1292(b)..... 18

OTHER AUTHORITIES:

Canon 4, *Code of Professional Responsibility* 4

Canon 5, *Code of Professional Responsibility* 4

Canon 9, *Code of Professional Responsibility*.... 4, 11, 15

Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 *Harv. L. Rev.* 589 (1974)... 16

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Petitioners,

v.

SMITH, COHEN, RINGEL, KOHLER & MARTIN and BARTHOLD & MCGUIRE,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Arnall, Golden & Gregory and Touche Ross & Co. respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 20, 1979. A Joint

Petition for Rehearing En Banc was timely filed in the United States Court of Appeals for the Fifth Circuit on May 3, 1979. The Order denying rehearing and rehearing en banc was entered on June 20, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 593 F.2d 642 (5th Cir. 1979), appears in Appendix I hereto together with the Court's judgment. The opinion of the Court of Appeals denying rehearing and rehearing en banc (unpublished) appears in Appendix II hereto. The order of the United States District Court for the Northern District of Georgia (unpublished) appears in Appendix III hereto.

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit denying rehearing and rehearing en banc was entered on June 20, 1979. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, a district court's decision denying defendants' motion to disqualify certain of plaintiffs' counsel is a "final decision" within the meaning of 28 U.S.C. §1291 which is appealable as a matter of right, and, if so, whether 28 U.S.C. §1291 is made inapplicable because the district court's decision is rendered in a class action.

STATUTORY PROVISION INVOLVED

28 U.S.C. §1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This is a complex securities class action brought on behalf of an alleged class comprised of some 9,000 noteholders of North American Acceptance Corporation. The plaintiff noteholders have alleged violations of the federal and state securities laws and common law fraud. The amended complaint includes allegations that a securities fraud conspiracy existed among all defendants, including petitioners and co-defendants The First National Bank of Atlanta and The First National Holding Corporation (collectively the "Bank"), in connection with the sale of notes issued by North American Acceptance Corporation. The damages sought by the class against petitioners, the Bank and other defendants amount to approximately $40 million. Despite the common nature of the plaintiffs' claims asserting joint and several liability on the part of all defendants, respondent Smith, Cohen, Ringel, Kohler & Martin ("Smith, Cohen"), lead counsel for the plaintiff class, has throughout the case substantially represented the Bank and continues to do so. Indeed, Smith, Cohen has been paid $570,000.00 by the Bank for representation in 162 different matters over the years while this lawsuit has been in progress.

This action was commenced in February, 1974,[1] and

[1] Three separate class actions were filed in February, 1974, one of which was filed by Smith, Cohen as counsel. The cases were consolidated prior to class certification. Touche Ross & Co. was made a party defendant in June, 1974, and Arnall, Golden & Gregory was added as a party defendant in June, 1975.

certified as a class action in March, 1975, but it was not until December, 1977 that petitioner Arnall, Golden & Gregory ("Arnall, Golden") learned of Smith, Cohen's simultaneous representation of the Bank and the plaintiff class. A motion to disqualify Smith, Cohen alleging violations of Canons 4, 5 and 9 of the Code of Professional Responsibility[2] was filed by Arnall, Golden on April 13, 1979, and petitioner Touche Ross & Co. ("Touche Ross") joined in that motion.

Smith, Cohen's response to a subpoena duces tecum requesting information regarding its representation of the Bank for the years 1974 through 1977, showed the following:

Year	Number of Matters Handled by Smith, Cohen for the Bank	Fees Paid to Smith, Cohen by the Bank
1974	19	$ 87,000.00
1975	21	86,000.00
1976	65	177,000.00
1977	57	220,000.00

From June, 1975,[3] Smith, Cohen has served as lead counsel for the plaintiff class, and at the same time

[2] Although the motion to disqualify was based on violations of Canons 4, 5 and 9 of the Code of Professional Responsibility, petitioners relied on Canons 5 and 9 in both the district court and the court of appeals.

[3] After consolidation and before its withdrawal in June, 1975, the law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein was lead counsel for the plaintiff class. After that firm's voluntary withdrawal from the case, Smith, Cohen became successor lead counsel. From the inception of the case in February, 1974, the plaintiff class has also been represented by the law firms of Somers & Altenbach and Edwin Marger.

Petitioners' motion to disqualify did not challenge the continuing representation of the plaintiff class by the law firms of Somers & Altenbach or Edwin Marger, did not challenge the adequacy of class representation by the named plaintiffs, and did not seek reconsideration of the district court's earlier class certification.

the firm has continuously represented the Bank in substantial matters from which it has earned significant fee income.

In response to the motion to disqualify, Smith, Cohen filed a motion seeking limited withdrawal as plaintiffs' class counsel. Denying that any conflict of interest existed by virtue of its simultaneous representation, Smith, Cohen nevertheless sought a limited withdrawal as to claims of the class against the Bank only. Simultaneously, one of the named plaintiffs, who had originally been represented by Smith, Cohen, *see* note 1, *supra*, filed a motion for the appointment of respondent Barthold & McGuire as the exclusive counsel for the plaintiff class regarding its claims against the Bank, should the district court grant Smith, Cohen's motion for limited withdrawal.[4] Petitioners urged the district court not to allow Barthold & McGuire to represent the plaintiff class because it had been retained by Smith, Cohen while a conflict of interest existed by virtue of Smith, Cohen's conflicting representation of the class and the Bank.

On May 24, 1978, the district court denied the motion for disqualification; granted Smith, Cohen's motion for limited withdrawal; and granted the plaintiffs' motion to substitute Barthold & McGuire as counsel for the class in respect to its claims against the Bank. *See* Appendix III.

[4] Barthold & McGuire had earlier been engaged by Smith, Cohen and Smith, Cohen had advanced funds to reimburse Barthold & McGuire's expenses. The two firms were negotiating a retainer agreement up to the time the motion to disqualify was filed.

Arnall, Golden noticed an appeal from the district court's order on June 6, 1978, and Touche Ross filed its notice of appeal on June 22, 1978. In response to petitioners' motion therefor, the Fifth Circuit granted expedited appeal on August 18, 1978.

Smith, Cohen filed a motion to dismiss the appeal on August 14, 1978, and Barthold & McGuire filed a similar motion on August 17, 1978. These motions raised the question whether Fifth Circuit authority permitting appeal as of right from a denial of a motion to disqualify counsel should be reexamined in light of *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). Petitioners took the position that *Coopers* was inapplicable, *see* note 3, *supra*, and that the district court's decision was appealable as a matter of right under 28 U.S.C. §1291, as interpreted by *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and the Fifth Circuit authorities applying *Cohen* in the context of disqualification appeals. On November 3, 1978, the Fifth Circuit ordered that respondents' motions to dismiss the appeal be carried with the case.

On April 20, 1979, the Fifith Circuit entered its opinion granting the respondents' motion to dismiss. *See* Appendix I. On May 3, 1979, Arnall, Golden and Touche Ross jointly petitioned the Fifth Circuit for rehearing en banc, and on June 20, 1979 the Fifth Circuit entered its opinion and order denying that petition. *See* Appendix II.

REASONS FOR GRANTING THE WRIT

(1) The Second, Third, Fourth, Fifth, Seventh, Eighth and Tenth Circuits are in Conflict With the Sixth, Ninth and District of Columbia Circuits Over the Question Whether the Denial of a Motion to Disqualify Counsel is a "Final Decision" Within the Meaning of 28 U.S.C. §1291.

Section 1291 of Title 28 of the United States Code provides for appeal as a matter of right from "final decisions" of the district courts. Section 1291's applicability is not limited to appeals from final judgments; rather the Section has been interpreted to permit such appeals from decisions which dispose of important, collateral questions that cannot be effectively reviewed on appeal from final judgment. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, this Court upheld a Section 1291 appeal of a district court order denying a defendant's motion to require the Plaintiff to post security against expenses. The Court stated:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." (Citations omitted).

337 U.S. at 546. *See also Stack* v. *Boyle*, 342 U.S. 1 (1951); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Abney* v. *United States*, 431 U.S. 651 (1977);

National Socialist Party v. *Skokie*, 432 U.S. 43 (1977). *But see United States* v. *MacDonald*, 435 U.S. 850 (1978), *cert. denied*, ___ U.S. ___ , 99 S.Ct. 1504 (1979); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978).

While this Court has not considered the applicability of Section 1291 to district court grants or denials of motions to disqualify counsel for alleged violations of the Code of Professional Responsibility,[5] the courts of appeals have considered the question.

The courts of appeals have decided in favor of Section 1291's applicability to decisions granting such motions. However, there is a conflict regarding the Section's applicability to decisions denying such motions. The Second, Third, Fourth, Fifth, Seventh, Eighth and Tenth Circuits, on the one hand, have held that a district court's decision denying a motion to disqualify counsel on ethical grounds is a "final decision" within the meaning of Section 1291 which is appealable as a matter of right,[6] while the Sixth,

[5] Petitions for certiorari were denied in *Kramer* v. *Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976), *Fred Weber, Inc.* v. *Shell Oil Co.*, 556 F.2d 602 (8th Cir. 1977), *cert. denied* 436 U.S. 906 (1978), and *Westinghouse Elec. Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, ___ U.S. ___ , 99 S.Ct. 353 (1978), all of which allowed a direct appeal of orders denying disqualification motions under Section 1291.

[6] *See Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1972); *Kramer* v. *Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); *MacKethan* v. *Peat, Marwick, Mitchell & Co.*, 557 F.2d 395 (4th Cir. 1977); *Tomlinson* v. *Florida Iron and Metal, Inc.*, 291 F.2d 333 (5th Cir. 1961); *Woods* v. *Covington Cty. Bank*, 537 F.2d 804 (5th Cir. 1976); *Schloetter* v. *Railoc of*

Ninth and District of Columbia Circuits, on the other hand, have held the opposite.[7] The divergence of view centers upon the *Cohen* requirement that effective review after final judgment cannot be had. 337 U.S. at 546. This divergence is exemplified by decisions in the Second and District of Columbia Circuits.

In *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc), the Second Circuit concluded that a district court's order denying a motion to disqualify "has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." 496 F.2d at 805. However, in *Community Broadcasting of Boston, Inc.* v. *F.C.C.*, 546 F.2d 1022 (D.C. Cir. 1976), the District of Columbia Circuit concluded that such a district court's order "does not, in most cases, implicate any claim of right that will be irreparably lost on appeal from final judgment." 546 F.2d at 1028. The conflict could not be more patent.

Although the Fifth Circuit dismissed this appeal because of the class status of the case, its analysis began and ultimately rested on an interpretation of *Cohen*. Thus, this petition for certiorari gives this Court the opportunity, not only to settle a conflict

Indiana, Inc., 546 F.2d 706 (7th Cir. 1976); *Westinghouse Elec. Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 353 (1978); *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); *Fullmer* v. *Harper*, 517 F.2d 20 (10th Cir. 1975).

[7] *See Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Cord* v. *Smith*, 338 F.2d 516 (9th Cir. 1964), *clarified*, 370 F.2d 418 (9th Cir. 1966); *Community Broadcasting of Boston, Inc.* v. *F.C.C.*, 546 F.2d 1022 (D.C. Cir. 1976). *But c.f. Trone* v. *Smith*, 553 F.2d 1207 (9th Cir. 1977).

among the circuits in the class action context, *see*, discussion *infra*, subpart (2), but also to resolve the broader conflict among the circuits regarding the general applicability of Section 1291 to such decisions. Indeed, in light of this Court's statement in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978), that "[t]he appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation," resolution of the more general conflict would be an appropriate if not necessary step toward resolution of the conflict in the more limited class action context.

In view of the importance of this issue and the divergence of views among the courts of appeals, petitioners respectfully submit that this conflict justifies the grant of certiorari to review the judgment below.

(2) The Fifth Circuit, by Focusing on the Class Aspect of This Case as the Basis for Its Denial of Appealability Under 28 U.S.C. §1291, is in Conflict with the Decisions of the Second and Third Circuits in *General Motors Corporation* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) and *Kramer* v. *Scientific Control Corp.*, 534 F.2d *1085 (3d Cir.), cert. denied, 429 U.S. 830 (1976).*

The Fifth Circuit concluded that, because it was entered in a class action, the district court's order did not conclusively determine the disputed question. The Fifth Circuit also held that, in a class action, the

decision was reviewable on appeal from final judgment. Thus, the Fifth Circuit found that two of *Cohen's* requirements were not met in this case.[8]

Reliance on the class aspect of this case as the basis for decision conflicts with results reached in the Second and Third Circuits. *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Kramer* v. *Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

In *General Motors Corp.*, the City of New York brought an antitrust action on behalf of a nationwide class consisting of governmental units and instrumentalities which purchased buses or bus parts from General Motors. After the class was certified, General Motors moved to disqualify the City's counsel. The district court denied the motion and General Motors appealed the order certifying the class and the order denying its motion to disqualify. On appeal, the City argued that neither order was a "final decision" within the meaning of Section 1291. The Second Circuit dismissed the appeal from the order granting class certification, but concluded that the appeal from the order denying the disqualification motion was appealable as a matter of right under Section 1291. On the merits, the Second Circuit reversed because of an appearance of impropriety and consequent violation of Canon 9.

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[8] Petitioners had argued the applicability of *Cohen* in their brief in opposition to the respondents' motions to dismiss the appeal. On request for rehearing, petitioners argued that *Woods* v. *Covington Cty. Bank*, 537 F.2d 804 (5th Cir. 1976), which permitted a Section 1291 appeal from a district court's order denying a motion to disqualify class counsel, should control.

Kramer v. *Scientific Control Corp.*, *supra*, was a securities class action. After the class certification, a defendant moved to disqualify plaintiffs' counsel. Treating the motion as a request for reconsideration of its order granting class certification, the district court denied the motion. The defendant appealed from the class certification order and the order denying the motion to disqualify. The Third Circuit dismissed the appeal from the class certification order, but concluded that Section 1291 permitted the appeal from the order denying the motion to disqualify.

> "Where a serious question of impropriety arises in the context of a motion to disqualify an attorney from proceeding to trial, this court has invoked the collateral rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Accordingly, we have held that district court orders denying such motions may be appealable under 28 U.S.C. §1291.
>
> * * *
>
> [I]n this case the district court treated the motion to disqualify counsel as a motion to reconsider the class action certification decision. The issue on certifying plaintiffs as class representatives—whether they would 'fairly and adequately protect the interests of the class', F.R.Civ.P. 23(a)(4), when their counsel was an employee (and later a partner) in Kramer's firm—was related, but not identical to, the issue posed by the disqualification motion. Reducing the distinction to its bare essentials, the former issue relates to who may serve as class representative, while the latter relates to who may serve as counsel. The trial court failed to perceive the difference and consequently erred."

534 F.2d at 1088. Reaching the merits, the Third Circuit reversed based on a Canon 9 violation. Most significantly, unlike the Fifth Circuit in the instant case, the Third Circuit refused to equate a challenge to the class certification element of adequate representation with a charge of ethical impropriety by class counsel.

In *Coopers & Lybrand*, *supra*, this Court stated that "[t]he appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation." 437 U.S. at 470. Certainly Section 1291 draws no distinction between ordinary adversary litigation and class actions. By failing to distinguish between adequate representation for purposes of class certification, on the one hand, and a motion to disqualify class counsel, on the other, the Fifth Circuit has effectively established and applied different standards for determining Section 1291 appealability for class actions. It has, in the process, also created a conflict with the Second and Third Circuits.

Petitioners respectfully submit that the Fifth Circuit's failure to follow *Coopers & Lybrand* and its conflict with the Second and Third Circuits justify the grant of certiorari to review the judgment below.

(3) The Fifth Circuit Has Improperly Applied This Court's Decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court held that a "final decision" within the meaning of Section 1291 must resolve an important collateral issue, conclusively determine the disputed question, and be effectively unreviewable on

appeal from a final judgment. *See Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). While not disputing the importance of the issue or its collateral nature, the Fifth Circuit held that the district court's decision was neither conclusive nor effectively unreviewable on appeal from final judgment. In so holding, the Fifth Circuit misapplied *Cohen*, especially in light of its admonition that Section 1291 should be applied through a "practical rather than a technical construction." 337 U.S. at 546.

The Fifth Circuit improperly relied on Rule 23 as the basis for its decision. This Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), when juxtaposed to *Coopers & Lybrand, supra*, shows that Rule 23 does not answer the question whether a district court's decision is "final" within the meaning of Section 1291. In *Eisen*, a district court's decision under Rule 23, that the defendant in a class action should bear the expense of class notice, was determined to be "final" under *Cohen*, whereas in *Coopers & Lybrand*, the district court's decision under Rule 23 denying class certification was determined not to be "final" under *Cohen*. The differing results in these two cases makes it clear that the finality of a collateral order is not determined by the class action status of the litigation, as the Fifth Circuit determined in the present action. *See* Appendix I, p.4. In private adversary litigation a district court has the power on its own motion to reconsider a prior decision denying a motion to disqualify. Such power is by no means unique to class actions. A district court's obligation to prevent ethical misconduct or the appearance thereof in order to protect the parties, the public and the judicial system does not emanate from and is not affected by the type of litigation involved.

Moreover, the Fifth Circuit erroneously concluded that the district court's order was not conclusive within the meaning of *Cohen*. The district court denied petitioners' motion because of its view that the remedy of limited withdrawal removed whatever conflict or appearance of conflict might otherwise exist.[9] The district court's primary concern was the representation of counsel available to the class if petitioners' motion to disqualify Smith, Cohen were granted. There was nothing tentative about the district court's disposition of the motion. The district court made it perfectly clear that Smith, Cohen was in the case to stay.

The Fifth Circuit also misapplied *Cohen* in determining that the district court's order could be effectively reviewed on appeal from final judgment. Petitioners charged violations of Canons 5 and 9 of the Code of Professional Responsibility based upon Smith, Cohen's simultaneous representation of the Bank and the plaintiff class. Neither violation can be effectively reviewed on appeal from a final judgment. *See* note 6, *supra*.

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[9] The remedy of limited withdrawal is illusory. The plaintiff class has asserted that the Bank conspired with petitioners and other defendants to commit securities and common law fraud. The advancement of any element of the case against any member of the alleged conspiracy, therefore, advances the plaintiffs' case against the Bank. Moreover, Smith, Cohen will not as a practical matter be able to disassociate itself from participating in the collective efforts of class counsel. The district court dismissed these concerns as being "rhetorical." The concerns are not rhetorical; they raise significant issues concerning appearances of impropriety by counsel which violate Canon 9 of the Code of Professional Responsibility.

Petitioners are genuinely concerned that, after shouldering the burden and expense of discovery and trial in this complex securities action, final judgment may be collaterally attacked by class members based upon Smith, Cohen's participation as class counsel. *C.f. Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973); Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 *Harv. L. Rev.* 589 (1974). Such collateral review after judgment would hardly be "effective" as far as petitioners are concerned. Even if the claims against petitioners are successful, the public's perception of the ethical impropriety cannot be effectively dispelled on appeal from a final judgment. The public harm will by then have festered for years. In this context, effective review requires *timely* review; untimely review of ethical violations creating substantial appearances of impropriety means no review at all.

Its reliance on the class aspect of this case as the basis for decision led the Fifth Circuit to misapply *Cohen* and thereby improperly deny Section 1291 appeal from the district court's order. Petitioners respectfully submit that the Fifth Circuit's misapplication of *Cohen* justifies a grant of certiorari to review the judgment below.

(4) The Fifth Circuit's Decision Raises Important Questions Regarding the Role of the Courts of Appeals in the Timely Enforcement of the Ethical Obligations of Counsel Under the Code of Professional Responsibility.

The Fifth Circuit's decision, as well as the decisions in the Sixth, Ninth and District of Columbia Circuits, *see* note 7, *supra*, reveal a basic questioning of the proper role of the courts of appeals in the enforcement of ethical standards. The institutional importance of having a mechanism for timely enforcement cannot seriously be questioned. But burgeoning appellate caseloads as well as the potential for tactical abuse of motions to disqualify have combined to put in question the role of the court of appeals as a policing forum. Petitioners respectfully urge that the courts of appeals must continue to play a vital and timely role in this process in order to foster public confidence in and respect for the judicial system.[10]

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[10] If, in 1974, Smith, Cohen had revealed to the district court its substantial representation of the Bank, perhaps the district court would not have permitted Smith, Cohen to serve as class counsel. Through silence, Smith, Cohen was able to work itself into a position where, by 1978, when petitioners' motion was filed, the district court felt compelled to deal with the potential impact on the class should Smith, Cohen be disqualified. That consideration would not have been required had disclosure earlier been made. This sequence of events, coupled with the Fifth Circuit's refusal to allow appeal as a matter of right in class actions, creates a situation where class counsel are permitted to derive indefinite benefit from their failure to be candid with the Court and the parties. Appeal as a matter of right under Section 1291 will prevent or at least inhibit such tactics.

If, as petitioners believe, the average citizen will not understand how Smith, Cohen can vigorously represent the plaintiff class in pressing joint conspiracy claims for which its substantial client, the Bank, is allegedly liable, the reputation of the judiciary as a self-policing institution is in serious jeopardy. It is no answer that years down the road, after final judgment, a court of appeals may have the opportunity to correct the situation.

While it can be argued that the institutional importance of timely appeal, on the one hand, and the objective to avoid tactical abuse or to control appellate dockets, on the other, can at once be fulfilled by interlocutory appeal under 28 U.S.C. §1292(b), petitioners believe that the necessity for prompt appellate review in cases raising substantial ethical questions is ill-served by a requirement for district court certification. Appellate control and deterrence of dilatory or specious appeals can be effectively achieved by discretionary assessment of attorney's fees, directly against counsel where necessary. *See Hall* v. *Cole*, 412 U.S. 1, 5 (1973).

Petitioners respectfully urge that the courts of appeals should play an active part in providing a timely remedy for correcting departures from ethical standards. The Fifth Circuit's decision signals an unfortunate and unwise retreat from the court's proper institutional place in this process.

Smith, Cohen has taken the position that it did not believe the simultaneous representation was significant because of the absence of any subject matter connection between the litigation and its representation of the Bank. Even accepting Smith, Cohen's explanation (but disagreeing with its conclusion), the tactical lesson to be learned from the Fifth Circuit's decision is clear.

CONCLUSION

For any or all of the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

/s/ _____

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APPENDIX

APPENDIX I

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 78-2600

NORTH AMERICAN ACCEPTANCE CORPORATION SECURITIES CASES,

Plaintiffs,

Smith, Cohen, Ringel, Kohler & Martin and Barthold & McGuire,

Plaintiffs-Appellees,

v.

ARNALL, GOLDEN & GREGORY and Touche Ross & Co.,

Defendants-Appellants.

April 20, 1979.

Rehearing and Rehearing En Banc Denied June 20, 1979.

See 597 F.2d 591.

Before GOLDBERG, SIMPSON and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge:

This is an appeal from a denial of a motion to disqualify counsel. The law firm of Smith, Cohen, Ringel, Kohler, and Martin (Smith Cohen) represents a plaintiff class against

various defendants in a complicated securities fraud action. Two of the defendants in that action, the law firm of Arnall, Golden, & Gregory (Arnall Golden) and the accounting firm of Touche Ross & Co. (Touche Ross), moved to disqualify Smith Cohen because of an alleged conflict of interest; Smith Cohen represents both the plaintiff class and, in unrelated matters, one of the defendants, the First National Bank of Atlanta (First National).

In response to the motion to disqualify, Smith Cohen filed a motion to withdraw from prosecuting the plaintiffs' claim against First National. It would continue to prosecute the plaintiffs' claims against the other defendants. The district court granted Smith Cohen's motion for limited withdrawal and appointed the law firm of Barthold & McGuire to represent the plaintiffs in prosecuting their claim against First National. Finding that Smith Cohen's limited withdrawal cured any conflict of interest which may have existed, the district court denied the motion to disqualify Smith Cohen. Defendants Arnall Golden and Touche Ross appeal this denial.[1]

We must first determine whether under 28 U.S.C. §1291 this court has jurisdiction to hear the appeal. Section 1291 provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." In general, an appeal under §1291 must be from a final judgment. *See Catlin* v. *United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). However, the Supreme Court recognized in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), that some interlocutory orders, those

[1] Appellants also argue that this court should disqualify Barthold & McGuire because of its connection with Smith Cohen—Smith Cohen had previously employed Barthold & McGuire to assist in representing the plaintiff class. We do not reach this issue because we conclude that there is no jurisdiction for the appeal.

meeting certain requirements, are appealable under §1291. The Supreme Court recently restated *Cohen's* requirements for appealability as follows: "[t]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978). Since the order in this case is not a final judgment, it must meet *Cohen's* three requirements to be appealable under §1291.

Many of our decisions have held that rulings on motions to disqualify counsel meet the *Cohen* requirements. *E.g.*, *Woods* v. *Covington City Bank*, 537 F.2d 804, 809 (5th Cir. 1976); *In re Yarn Processing*, 530 F.2d 83, 85 (5th Cir. 1976); *United States* v. *Garcia*, 517 F.2d 272, 275 (5th Cir. 1975); *Draganescu* v. *First National Bank*, 502 F.2d 550, 551 (5th Cir. 1974); *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F.2d 333, 334 (5th Cir. 1961). However, none of these decisions involved a motion to disqualify a class attorney. Our recent decision in *Zylstra* v. *Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978), establishes that rulings on motions to disqualify class counsel are not necessarily appealable under §1291.

The issue in *Zylstra*, as in this case, was whether a denial of a motion to disqualify the class attorney was appealable under § 1291[2]. The *Zylstra* court recognied that disqualification orders are generally appealable. It held, however, that the order before it was not appealable because the disqualification issue was really a part of the class certification question.[3] It set up the following test to

[2] The motion to disqualify class counsel in *Zylstra* was also based on an alleged conflict of interest. The named plaintiffs included both the wife and law partner of the attorney for the class.

[3] The class certification decision is not appealable. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); *Bennett* v. *Behring Corp.*, 525 F.2d 1202 (5th Cir. 1976); and *Knox* v. *Amalgamated Meat Cutters*, 520 F.2d 1205 (5th Cir. 1975).

determine the appealability of rulings on motions to disqualify class counsel: "where the issue of counsel's disqualification is so intertwined with the issue of certification of the class that the two cannot be separately decided, the result must be that no separate appeal of a ruling on disqualification will lie." Id. at 104 n.1.

It was not the particular conflict of interest raised in *Zylstra* that made the disqualification issue a part of the certification question. Whenever a district court is aware of possible grounds for disqualifying the class attorney before it makes the certification decision, the disqualification issue will be a part of the certification question. This is due to the fact that the court, in order to certify the class, must find that class counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *Johnson* v. *Georgia Highway Express, Inc.* 417 F.2d 1122, 1125 (5th Cir. 1969).[4] Obviously, an attorney who should be disqualified because of a conflict of interest will not meet this requirement. Thus, in deciding whether or not to certify the class, the court must necessarily decide any disqualification issue presented. *See., e.g., Conway* v. *City of Kenosha*, 409 F.Supp. 344 (E.D. Wis. 1975); *Basch* v. *Talley Industries, Inc.*, 53 F.R.D. 14 (S.D.N.Y. 1971).

Since the court in this case was unaware of class counsel's alleged conflict of interest when it certified the class,

[4] Federal Rule of Civil Procedure 23, which sets out the requirements a court must find in order to certify a class, does not specify that the court must find that class counsel is qualified. It does state, however, that a court must find that "the representative parties will faily and adequately protect the interest of the class." Fed.R.Civ.P. 23(a)(4). In deciding whether this requirement is met, courts examine the qualifications of the class attorney. They focus on the attorney, as well as the named parties, because they realize the important role the attorney plays in protecting the interests of the class. *See Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

it could not have considered the disqualification issue in making its certification decision. The *Zylstra* test provides that the disqualification ruling will not be appealable when the disqualification and certification issues are so intertwined that they "cannot be separately decided." *Id.* In this case the certification question was decided separately from the disqualification question. Thus, *Zylstra* does not compel us to hold that the disqualification order is not appealable. Nonetheless, we so hold because we conclude, for the reasons stated below, that denials of motions to disqualify class counsel are not appealable under §1291.

Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), is our starting point. Although it is no solvent it does give guides. Although it does not spell out the resolution of our problem, it does provide a rubric of appealability. As we stated earlier, to be appealable under § 1291, an interlocutory order must meet the three requirements set forth in *Cohen.* Our cases have held that denials of motions to disqualify counsel, *when counsel is representing an individual client,* meet the *Cohen* requirements. *E.g., In re Yarn Processing,* 530 F.2d 83, 85 (5th Cir. 1976). *Zylstra*shows us, however, that we cannot assume that a denial of a motion to disqualify *class counsel* will also be appealable under § 1291. Class actions are a species unto themselves and should often be judicially treated as such. In fact, when we consider denials of motions to disqualify class counsel under *Cohen,* we find that because of the special nature of class actions, these orders do not meet two of *Cohen's* three requirements—the requirement that the order "conclusively determine the disputed question" and the requirement that the order "be effectively unreviewable on appeal from a final judgment."[5]

[5] Our statement of the *Cohen* requirements is taken from the Supreme Court's recent application of them in *Coopers & Lybrand v. Livesay.* 437 U.S. 463, 98 S.Ct. 2454, 2458, 57 L.Ed.2d

The denial of a motion to disqualify class counsel may not conclusively decide the disqualification question because, in a class action, the trial court has the continuing duty to see that the class is adequately represented. *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir. 1977). To perform this duty, the trial court must constantly scrutinize the class attorney to see that he is adequately protecting the interests of the class. If, at any time, the trial court relaizes that class counsel should be disqualified, it is required to take appropriate action. It must either enter orders eliminating the problem or decertify the class. *See id.;* Fed.R.Civ.P. 23(d). In the ordinary adversary litigation the trial court does not have this monitoring duty, and thus, the disqualification question generally presents the trial court with a now or never dicision. However, in class actions because of this special duty imposed on the trial court, the court's initial denial of the disqualification motion may not conclusively determine the disqualification issue.

Furthermore, a denial of a motion to disqualify class counsel can be effectively reviewed on appeal from a final judgment. The party's claim that the class attorney should have beeen disqualified is, in effect, a claim that the class was not adequately represented. And the requirement that the class be adequately represented is reviewable on appeal from a final judgment. *See, e.g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 85th Cir. 1976).

Because of the problems of piecemeal review, and because courts are burdened beyond measure, we must be

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351 (1978). We note that although the "effectively unreviewable" requirement was a basis for the decision in *Cohen, see* 337 U.S. at 546, 69 S.Ct. 1221, we have not always emphasized it when we considered whether orders were appealable under *Cohen. See, e.g., In re Yarn Processing*,530 F.2d 83, 85 (5th Cir. 1976). The other *Cohen* requirement, "that the order resolve an important issue completely separate from the merits of the action," is met.

parsimonious in our analysis of appealability. A parsimonious analysis need not be unjust. It should simply be a strict application of *Cohen.* In the great majority of cases *Cohen* will lead the court to correctly conclude that an interlocutory order is not appealable. But should it not, we note that there is another avenue for appeal open to the litigants. Under 28 U.S.C. § 1292(b) the trial judge may certify as appealable otherwise unappealable orders.[6] Thus § 1292(b) is a safety valve which can prevent any injustice that may be caused by the strict application of *Cohen.*

For the ressons stated we hold that the denial of the motion to disqualify the class counsel is not appealable under § 1291. Because we have no jurisdiction, we dismiss the appeals.

DISMISSED.

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[6] §1292(b) provides, "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may there upon, in its discretion, permit an appeal to be taken from such order. . .."

APPENDIX II

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 78-2600

NORTH AMERICAN ACCEPTANCE CORPORATION SECURITIES CASES,

Plaintiffs,

Smith, Cohen, Ringel, Kohler & Martin and Barthold & McGuire,

Plaintiffs-Appellees,

v.

ARNALL, GOLDEN & GREGORY and Touche Ross & Co.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia; Charles A. Maye, Jr., Judge.

On Petition For Rehearing and Petition For Rehearing En Banc

(Opinion April 20, 1979, 5 Cir., 1979, 593 F.2d 642).

Before GOLDBERG, SIMPSON and CLARK, Circuit Judges.

PER CURIAM:

Appellants correctly point out in their petition for rehearing and rehearing en banc, that in our panel opinion[1]

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[1]. *North American Acceptance Corp.* v. *Arnall, Golden & Gregory,* 593 F.2d 642 (5th Cir., 1979).

we miscited *Woods* v. *Covington County Bank,* 537 F.2d 804 (5th Cir. 1976). *Woods* involved a motion to disqualify a class attorney, and we cited it as though it involved a motion to disqualify an attorney representing an individual client. This error, however, changes neither the analysis in our panel opinion nor our conclusion.

The court in *Woods* held the attorney disqualification order to be appealable under 28 U.S.C. §1291 because other attorney disqualification orders had been held to meet the requirements for appealability set out by the Supreme Court in *Cohen*v. *Beneficial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The cases on which the Woods court relied, howeve, did not involve motions to disqualify a class attorney. Since the court did not even address this distinction, we certainly do not read *Woods* as holding that rulings on motions to disqualify class counsel are appealable under § 1291.

Indeed, in *Zylstra v. Safeway Stores, Inc.,* 578 F.2d 102 (5th Cir. 1978), we held that a ruling on a motion to disqualify a class counsel was not appealable under §1291. As we read *Zylstra,* it shows what rulings on motions to disqualify class counsel cannot automatically be treated like other attorney disqualification orders. Accordingly, we concluded in our panel opinion that we should consider these rulings under the test set forth by Supeme Court in *Cohen* for determining the appealability of orders under §1291. Under that test, a denial of a motion to disqualify class counsel is not appealable. Significantly, appellants do not dispute this conclusion.

The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION NO. C74-193, et al. JOINT FILE

NORTH AMERICAN ACCEPTANCE CORPORATION SECURITIES CASES

Order

This complex securities class action is now complicated further by the motion of defendants Arnall, Golden & Gregory and Touche, Ross & Co. that Smith, Cohen, Ringel, Kohler & Martin (Smith, Cohen), attorney for the plaintiff class, be disqualified as counsel for the plaintiff class because it presently represents The First National Bank of Atlanta, one of the defendants in the suit. The motions allege violation of the Code of Professional Responsibility (CPR) Canons 4, 5, and 9. Smith, Cohen responds by seeking to withdraw from prosecution against the First National Bank, but to continue to represent the plaintiffs otherwise.

An accepted principle in dealing with questions of ethical responsibility is that

> we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precident.

United States v. *Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955), cited in *Fund of Funds* v. *Arthur Andersen & Co.*, 567 F.2d 225, 227 (2d Cir. 1977). A careful examination of the facts is therefore appropriate.

In February 1974, three separate actions were filed against the North American Acceptance Corporation

(NAAC), each alleging that NAAC had violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Georgia Securities Act of 1957, and common law. The suits named as defendants other than NAAC certain officers and directors of NAAC and NAAC's parent corporation, Omega-Alpha, Security Mortgage Investors (SMI) and certain other persons or entities in common control of, or in common control with, NAAC. The attorneys for the three individual plaintiffs were the Atlanta law firms of Kilpatrick, Cody, Rogers, McClatchy & Regenstein (Kilpatrick, Cody), Somers & Altenbach, and Smith, Cohen. On June 3, 1974, an amended complaint naming The First National Bank as an additional defendant was filed by Kilpatrick, Cody, and on June 6, 1974, the suits were consolidated by order of this Court, with Kilpatrick, Cody being designated lead counsel. The other firms remained in the action as support counsel. The complaint was amended three times subsequent to consolidation, with the First National Holding Corporation being named an additional defendant, and the suit was certified as a class action, with counsel for the named plaintiffs to act as counsel for the plaintiff class, on March 11, 1975. On June 16, 1975, Kilpatrick, Cody was permitted to withdraw from the case and Smith, Cohen was designated new lead counsel.

Smith, Cohen has represented the plaintiff class in the instant action, in the reorganization of NAAC under Chapter X of the Federal Bankruptcy Act presently being carried out in the Bankruptcy Division of this Court, and in the reorganization of Omega-Alpha, also under Chapter X, now pending in the Bankruptcy Division of the District Court for the Northern District of Texas. Settlement agreement has been reached between the plaintiff class and certain defendants in this suit, viz., SMI; Semorco, Inc.; Smith Barney Real Estate Corporation; Smith, Barney, Harris Upham & Co., Incorporated; Shearson, Hayden & Stone, Inc.; Marshall Cogan; and Bozell & Jacobs, and approved by this Court.

At an unstated time after the pendency of this litigation, Smith, Cohen undertook to represent The First National Bank (the Bank) on a limited basis concerning real estate finance transactions. Smith, Cohen has never represented the Bank on a retainer or an "of counsel" basis. The representation of the Bank became known to counsel for Arnall, Golden & Gregory (AG&G) in late 1977, and said counsel filed a motion to disqualify Smith, Cohen from any representation of the plaintiff class on April 13, 1978. Smith, Cohen responded with a motion to allow limited withdrawal on April 20, 1978. Also on April 20, 1978, the named plaintiff represented by Smith, Cohen, Mr. A.P. Whitehead, moved for the appointment of Harold McGuire of the New York firm of Barthold & McGuire , as counsel for the prosecution of claims against The First National Bank. Mr. McGuire was brought into the case by Smith, Cohen in an "of counsel" capacity in March 1978.

Both AG&G and defendant Touche, Ross & Co. have responded in opposition to Smith, Cohen's motion for limited withdrawal. All arguments of AG&G will be assumed to have the concurrence of Touche Ross. The First National Bank has raised no objection to Smith, Cohen's representation of the plaintiff class.

AG&G argues that concurrent representation of the plaintiff class in the instant action and of the Bank in other matters is a prima facia violation of CPR Canons 4, 5 and 9, requiring total disqualification of Smith, Cohen from the suit. AG&G argues that limited withdrawal is an insufficient remedy inasmuch as the claims against the Bank are closely interwoven with claims against the remaining defendants and protection of the interests of the Bank would prevent Smith, Cohen from prosecuting fully the claims of the plaintiffs against the defendants. Further, AG&G contests the motion for appointment of Harold McGuire to represent the plaintiff class inasmuch as the plaintiff class did not itself choose Mr. McGuire and

Mr. McGuire was hired by the Smith, Cohen firm, giving rise to the presumption that Mr. McGuire has had access to confidential information of the Bank. Finally, the moving defendants allege that they have standing to move the disqualify Smith, Cohen despite the failure of the Bank to object to Smith, Cohen's representation of the plaintiff class, relying on the Fifth Circuit's statement in *In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976):

> It is argued that the government lacked standing to challenge the alleged conflict of interest, and that the trial judge had no jurisdiction to entertain the government's motion for disqualification. We reject these contentions. The substance of the government's motion was that appellant had violated the ethical canons of the American Bar Association, which prohibit a lawyer from representing parties with adverse interest . . . When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention.

Smith, Cohen's principal arguments are as follows: First, total withdrawal by Smith, Cohen would have unduly harsh, possibly terminal, results for the plaintiff class inasmuch as the firm has knowledge of the case by built after four years which would be impossible to replicate in any other law firm. Second, Smith, Cohen urges that no issue exists with respect to Canon 4 of the CPR inasmuch as all involved counsel have admitted in open court that no accusation of divulgence of client confidences has been made or even that an opportunity for such divulgence existed. Third, Smith, Cohen argues that not every represeentation of a party concurrently as plaintiff and defendant in differing litigation represents a violation of Canon 5. Smith, Cohen states that the Court must look at whether a substantial relation between the separate litigations exists and stresses that, in any event, any impropriety or

appearance of impropriety will be cured by the firm's limited withdrawal. As to a violation of Canon 9, Smith, Cohen states that any impropriety or appearance of impropriety resulting from dual representation of the Bank must be balanced against the manifest injustice to the class which will result if Smith, Cohen is required to terminate its participation in the case. Smith, Cohen asserts that considerable delay has ensued between AG&G's cognizance of the dual representation of the Bank and the instant motions and implies that the motions, in view of the Bank's lack of stated concern, are more directed to litigation strategy than to the interests of the Bank or the public.

The matter before the Court is both a difficult and an important one. The Code of Professional Responsibility is the touch-stone of a profession under close and constant public scrutiny, and an allegation of violation must be considered carefully. As stated in *Woods* v. *Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), the Court must examine the ABA Canons, Ethical Considerations, and Disciplinary Rules, but must also

> be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely chosen counsel.

Id. at 810. *See Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973).

The Court is aware that the question of standing to raise matters presenting conflict of interest issues is not settled in the Fifth Circuit. *In re Gopman, supra,* requires any attorney with knowledge of ethical violations to bring them to the Court's attention. In *In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976), however, the Court cited extensive authority stating that*

an attorney may not be disqualified unless one of the clients whose interests may be adversely affected so moves. In the interest of properly resolving the instant controversy, the Court recognizes that AG&G, as discoverer of an alleged impropriety, is obligated to bring such impropriety to the Court's attention. The Court will now consider the alelged violations of the CPR canon by canon.

Canon 4

The Canon provides "A lawyer should preserve the confidences and secrets of a client." The Court finds that in the factual situation before it, no violation of this cannon orappearance of its violation is presented. The matters in which Smith, Cohen has undertaken to represent the Bank are matters involving the Bank's real estate division and its mortgage banking subsidiary. Representation on these matters could not have led to the divulgence of secrets or confidences to Smith, Cohen which would assist the firm in prosecuting the instant action. The Bank's acquiescence in Smith, Cohen's representation of the class attests to its lack of any perceived violation or possibility of violation of Canon 4 and is sufficient to prevent the appearance of impropriety. The admission by AG&G and Touche, Ross in open Court that no questions of confidentiality are present reinforces this conclusion.

Canon 5

Canon 5 states, "A lawyer should exercise independent professional judgment on behalf of a client." AG&G cites numerous cases for the proposition that this canon requires absolute disqualification wherever dual representation exists. *See, e.g., Fund of Funds, Ltd.* v. *Arthur Andersen & Co.* 567 F.2d 225 (2d Cir. 1977); *Cinema 5 Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976) ("no man can serve two masters"). Smith, Cohen, relying principally on *City of Cleveland* v. *Cleveland Electronic illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio 1977), *cert. denied,* 46 U.S.L.W. 3659 (U.S., April 25, 1978), argues that disqualification is not always necessary.

In the *City of Cleveland* case, the Court found that Squire, Sanders & Dempsey, which represented the defendant utility company, was not required to withdraw from the litigation despite its representation of the plaintiff city on unrelated municipal bond matters on an ad hoc basis since the initiation of the pricipal suit by the city. This case provides strong support for the argument that the facts of each case must be examined carefully to determine whether or not an actual conflict exists, and that if there is indeed no substantial relationship between the matters in litigation, representation of opposing clients in separate cases may be permissible. Fortunately, the Court is saved from such painstaking examination in the instant matter by Smith, Cohen's motion for limited withdrawal. The proposed solution appears to the Court to be a workable and paractical one; the rhetorical questions posed by AG&G in its opposition fail to persuade the Court htat Smith, Cohen's withdrawal from prosecution of claims against the bank does not resolve any remaining conflict of interest questions with the least possible damage to the litigation as a whole. Furthermore, such a solution has received approval in previous cases of this kind. *Fisher Studio* v. *Loew's Inc.*, 232 F.2d 199 (2d Cir. 1956); *Consolidated Theatres, Inc.* v. *Warner Bros. Theatre Corp., 216 F.2d 920 (2d Cir. 1954); Basch* v. *Talley Industries, Inc., 53 F.R.D. 14 (S.D.N.Y. 1971).*

Canon 9

No barrier to limited withdrawal is presented by Canon 9, "A lawyer should avoid even the appearnance of professional impropriety." The defendants have pointed to no actual impropriety on the part of Smith, Cohen. The Bank, the client whose interests are at stake, has made no complaint. Smith, Cohen's removal from litigation against the Bank removes any cause for claims of impropriety. The solution is far preferable under this canon to complete withdrawal of the firm from the litigation which would almost certainly leave the plaintiff in a difficult position.

Such a result could have only one effect: to severely undermine the public's perceptions of the bar and the Court. For the above reasons, AG&G's motion for complete disqualification is hereby DENIED and Smith, Cohen's motion for limited withdrawal is GRANTED.

The primary area of concern presented by allowance of Smith, Cohen's motion for limited withdrawal is the adequacy of representation of the class. In granting the motion, the Court has determined that, although practical procedural and trial problems will likely result from the limited withdrawal, such problems will be manageable and the class interest, since no questions of confidentiality are involved, will best be srved by the continued representation of the firm which has become completely familiar with the case over the four years of the suit's duration.

The remaining issue is whether or not Harold McGuire may be substituted as lead counsel in prosecuting the plaintiffs' claims against the Bank. AG&G contends that *Fund of Funds, Ltd.*v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977), prevents such substitution. That case is distinguishable from this. In that case, co-counsel had worked closely together over a significant period of time in preparing a case against a party for whom one co-counsel had been general counsel for over 15 years. The defendant objected strongly to such practice. None of those factors are present here. McGuire has had no previous contact with the Bank, no claims of divulgence of confidences are colorable, and the Bank makes no objection. Mr. McGuire has significant securities class action expertise, is acceptable to the plaintiffs and will adequately represent their interests. For these reasons, the motion of A. P. Whitehead to substitute Harold McGuire as counsel for prosecution of claims against the Bank is hereby GRANTED.

In summary, the motions of Arnall, Golden & Gregory and Touche, Ross for disqualification of Smith, Cohen, Ringel, Hohler & Martin are DENIED; Smith Cohen's motion for limited withdrawal is GRANTED; and A. P. Whiethead's motion to substitute counsel is GRANTED.

SO ORDERED, this 24 day of May, 1978.

/s/ Charles A. Moye
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
OCT 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-456

NORTH AMERICAN ACCEPTANCE CORPORATION SECURITIES CASES

ARNALL, GOLDEN & GREGORY and TOUCHE ROSS & CO.,
Petitioners,

v.

SMITH, COHEN, RINGEL, KOHLER & MARTIN and BARTHOLD & McGUIRE,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION .. 5

(1) There Is No Conflict Among The Circuits On The Question Presented 5

(2) The Fifth Circuit's Decision Is Not In Conflict With *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); Rather It Is In Accord With *Cohen* And Is A Correct Decision ... 10

CONCLUSION 14

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES:

Allegaert v. Perot, 565 F.2d 246, (2nd Cir. 1975) 9

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 6, 8, 9, 10, 13

Community Broadcasting of Boston, Inc. v. F.C.C., 546 F.2d 1022 (D.C. Cir. 1976) 9, 12

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) ..... *passim*

Cullen v. New York State Civil Service Commission, 566 F.2d 846 (2d Cir. 1977) 8

General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) 7, 8

Guerine v. J&W Investment, Inc., 544 F.2d 863 (5th Cir. 1977) 11

Handwerger v. Ginsberg, 519 F.2d 1339 (2nd Cir. 1975) 8

Kramer v. Scientific Control Corp., 534 F.2d 1085 (3rd Cir.), *cert. denied*, 439 U.S. 830 (1976) 9

Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) 7, 12

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) ... 7

Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) 7

Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) 12

W. T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976) 8

Zylstra v. Safeway Stores, Inc., 578 F.2d 102 (5th Cir. 1978) 12

STATUTES:

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 1292(b) 4, 12, 13

28 U.S.C. § 1651 ..... 12, 13

OTHER AUTHORITIES:

The Appealability of Orders Denying Motions for Disqualification of Counsel in Federal Courts, 45 U. Chi. L. Rev. 450 (1978) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-456

NORTH AMERICAN ACCEPTANCE CORPORATION SECURITIES CASES

ARNALL, GOLDEN & GREGORY and TOUCHE ROSS & CO.,
Petitioners,

v.

SMITH, COHEN, RINGEL, KOHLER & MARTIN and BARTHOLD & McGUIRE,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Smith, Cohen, Ringel, Kohler & Martin and Barthold & McGuire respectfully pray that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 20, 1979 be denied.

QUESTION PRESENTED

Whether a District Court's refusal to disqualify counsel for the plaintiff class in a securities class action for an alleged "appearance of impropriety" not affecting the moving defendants is appealable of right under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Petitioners are defendants in a complex securities class action arising out of the collapse of North American Acceptance Corporation ("North American"). Arnall, Golden & Gregory ("Arnall, Golden") were general counsel to North American, and Touche Ross & Co. ("Touche Ross") were outside auditors to North American, and are the Petitioners here. In 1978, Petitioners moved in the District Court to disqualify the two respondent law firms from representing the plaintiff class, based on an extraneous attorney-client relationship between one of the respondent firms, Smith, Cohen, Ringel, Kohler & Martin ("Smith, Cohen"), and the First National Bank of Atlanta ("First National"), another defendant.[1] Petitioners claimed that this relationship created an appearance of impropriety in violation of the Canons of Ethics.

The disqualification motions were triggered by a settlement proposal, negotiated by Smith, Cohen with other defendants in the case. Petitioners argued that the settlement proposal was "tainted" because, in view of Smith, Cohen's relationship to First National, it could not adequately represent the class. They argued that "protection of the interests of the Bank would prevent Smith, Cohen from prosecuting fully the claims

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[1] The basis for the motion to disqualify the other respondent, Barthold & McGuire, was its allegedly subservient relationship to Smith, Cohen. It was undisputed that at the time the disqualification motion was made, Barthold & McGuire had had a relationship of less than three months' duration with Smith, Cohen, limited to the instant case, in which it acted as "of counsel." This relationship involved no contact whatever with First National, direct or indirect.

of the plaintiffs against the defendants" (Appendix to Petition at 12a), and that this disability would present insuperable practical and ethical problems in the *future*.[2]

The plaintiff class was given written notice of the hearing on the proposed settlements and the disqualification motion. No member of the plaintiff class voiced any objection to the respondents' continued participation in the case.

First National has never taken a position, in the District Court or on appeal, with regard to the disqualification motions.[3]

The District Court denied disqualification, permitted Smith, Cohen to withdraw from the case as against First National to remove any possible appearance of impropriety in the future, and appointed respondent Barthold & McGuire as lead counsel for the class as against First National. Petitioners attempted to appeal as of right from all of these orders. They never asked the District Court to certify that the issue involved a "controlling question of law" on which an interlocutory appeal would "materially advance the ultimate termination of the litigation," as permitted by 28 U.S.C. § 1292(b).

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[2] Petitioners also argued the adequacy of class representation issue in briefs to the Fifth Circuit. They did not make that argument in their petition for rehearing.

[3] By way of background, it should be noted that Smith, Cohen did not participate in bringing First National into the case as a defendant. That was done by another law firm, in an action then unconsolidated with the action that Smith, Cohen had commenced. The actions were later consolidated and the other law firm withdrew. Thus, Smith, Cohen "acquired" the case against First National.

REASONS FOR DENYING THE PETITION

(1) There Is No Conflict Among The Circuits On The Question Presented

Petitioners base their application for a Writ upon a purported conflict among the Circuits as to whether the denial of a motion to disqualify counsel is a "final decision" within the meaning of 28 U.S.C. § 1291. That was not the issue before the Fifth Circuit. The Fifth Circuit was called upon to decide whether the denial of a motion to disqualify *class counsel* in a *class action* is a "final decision" under the statute. The class nature of this case was the explicit basis for the Fifth Circuit's opinion, and is a salient distinguishing feature which is not present in most of the cases cited as being in conflict.

Further, this case is most unusual in its factual pattern even among class actions. In this case the District Court assumed a continuing role in monitoring the behavior of class counsel to insure that no "appearance of impropriety" — such as formed the basis for the attempted disqualification in the District Court below — is permitted to infect the continuing proceedings. And, from the beginning, the District Court recognized its continuing duty to exercise supervisory control over class counsel to insure the adequacy of representation of the class. As the Fifth Circuit noted (Appendix to Petition at 6a):

> "To perform this duty, the trial court must continuously scrutinize the class attorney to see that he is adequately protecting the interest of the class. If, at any time, the trial court realizes that class counsel should be disqualified, it . . . must either

> enter orders eliminating the problem or decertify the class."

None of the Court of Appeals' cases which Petitioners cite as being in conflict have these distinguishing characteristics.

The District Court's Order clearly is not a final judgment. Consequently, it is subject to appeal of right only if it falls within that "small class" of orders deemed to be "final decisions" under the rules enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Cohen* was most recently analysed by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), in which this Court rejected the "death knell" doctrine espoused by the Second Circuit, and held that an order refusing to certify a case as a class action was not a "final decision" within the meaning of *Cohen*. In support of that holding, this Court noted:

> "To come within the 'small class' of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."

Id. at 468.

The Fifth Circuit's opinion relied heavily on *Coopers & Lybrand*, and held that the District Court's Order did not fall within the limited class of appealable non-final orders for two reasons. First, it did not "conclusively determine the disputed question" of the alleged appearance of impropriety because of the District

Court's continuing supervisory role over class counsel. Second, it was not "effectively unreviewable on appeal from final judgment." (The language quoted was taken verbatim by the Fifth Circuit from *Coopers & Lybrand.*)

No other Circuit has dealt with a class counsel disqualification motion utilizing a post-*Coopers & Lybrand* analysis.[4] Therefore, no conflict exists among the Circuits. Furthermore, only the Second and Third Circuits had decided disqualification questions in a *class action* context prior to *Coopers & Lybrand*, and their rulings can be reconciled with that of the Fifth Circuit below.

In *General Motors Corp. v. City of New York*, 501 F.2d 639 (2nd Cir. 1974), the Second Circuit held that an order refusing to disqualify class counsel was appealable under 28 U.S.C. § 1291. However, there is no indication that the Second Circuit considered the distinguishing factors relating to the selection of class counsel as opposed to individual counsel. Instead, the decision simply relied upon the Second Circuit's *en banc* decision in *Silver Chrysler Plymouth, Inc. v. Chrysler*

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[4] Two Circuits have addressed disqualification questions post-*Coopers & Lybrand* but not in a class context. The Seventh Circuit allowed an appeal in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), after *Coopers & Lybrand.* However, no Motion to Dismiss the Appeal was filed, and appealability was not a contested issue before the Seventh Circuit. The Sixth Circuit reversed its previous position in *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979), announcing that it would no longer take § 1291 appeals from unsuccessful attempts to disqualify counsel. The decision was on policy grounds, with no reference to *Coopers & Lybrand.*

Motors Corp., 496 F.2d 800 (2nd Cir. 1974), a case not involving class counsel.

There is, to say the least, a serious question as to whether the Second Circuit would follow *General Motors* on the same facts as were presented to the Fifth Circuit below. In a later case, the Second Circuit dismissed a § 1291 appeal from an order appointing class counsel, holding that a determination of the qualifications of class counsel, far from being collateral, was central to a finding of adequacy of representation. Since the question appealed was therefore not separable from the other issues in the case, it did not fall within the *Cohen* doctrine. *Cullen v. New York State Civil Service Commission*, 566 F.2d 846 (2nd Cir. 1977).

Similarly, in *Handwerger v. Ginsberg*, 519 F.2d 1339 (2nd Cir. 1975), the Second Circuit dismissed an appeal from the District Court's Order denying disqualification of plaintiff class counsel. The Second Circuit used language recognizing the unique considerations relating to disqualification of class counsel:

> "An order denying disqualification of counsel in a class action is not collateral to the main proceeding, and is not the final disposition of a claimed right, if the purported conflict of interest for which disqualification is sought is also directly relevant to the issue of propriety under FRCP 23, of the definition of the Class."

Id. at 1342.

The Second Circuit has also adopted stringent standards in reviewing unsuccessful disqualification attempts, *W. T. Grant Co. v. Haines*, 531 F.2d 671, 676-78 (2nd Cir. 1976), and has expressed unease over its

own appealability rule. *Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977). *See also Community Broadcasting of Boston, Inc. v. F.C.C.*, 546 F.2d 1022, 1027 (D.C. Cir. 1976), discussing the Second Circuit's experience.

Nor is the Third Circuit's position as clear as Petitioners indicate. Petitioners rely upon *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976), for the proposition that the Third Circuit accepts § 1291 appeals in a class context. But *Kramer* was restricted to the facts of that case. The Third Circuit cited in support of its decision the following language from a previous decision:

> "We do not hold that every ruling relating to conflict of interest by an attorney should activite the *Cohen* rule.
>
> 'Every interlocutory order involves, to some degree, a potential loss. The risks, however, must be balanced against the need for efficient federal judicial administration evidenced by the congressional prohibition of piecemeal appellate litigation. To accept (a contrary) view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters. [Citation omitted]' "

Id. at 1088 n.2.

It is apparent that the Third Circuit held that the order before it in *Kramer* was appealable not because orders disqualifying class counsel are appealable *per se*, but because the Third Circuit felt that the order in that particular case was important. Such an *ad hoc* ap-

proach to finality of orders would not today survive the Supreme Court's rejection of such appellate fact-finding missions. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473-76 (1978).

There is no conflict among the Circuits which merits the attention of this Court. Those cases not involving class counsel are irrelevant to the issues raised in this class action. The two Circuits which have accepted class counsel cases are not in conflict with the Fifth Circuit. In any event, both the Second and Third Circuits will have to re-examine their precedents in light of *Coopers & Lybrand*, as will all Circuits. Until the process of Circuit Court response to *Coopers & Lybrand* is complete, review by this Court of the Fifth Circuit's initial response would be premature.

(2) The Fifth Circuit's Decision Is Not In Conflict With *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); Rather, It Is In Accord With *Cohen* And Is A Correct Decision.

Petitioners seek to bolster their Application by arguing that the Fifth Circuit's decision is in conflict with this Court's decision in *Cohen*. Petitioners claim that the Fifth Circuit erred in holding that the District Court's Order was neither conclusive nor effectively unreviewable on appeal from a final judgment.

As to conclusiveness, Petitioners claim that a District Court has the power to disqualify individual counsel in any case, and therefore a class action order regarding class counsel is no more inconclusive than in an individual action. Petitioners are wrong. A District Court has the power to supervise the members of the

bar which practice before it, and indeed can disqualify counsel in any case. However, in class actions a District Court not only has that power but has the *obligation* to insure that class counsel not only act properly but also provide adequate representation to the members of the class. This continuing obligation on the part of the court distinguishes class actions. *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir. 1977).

Petitioners next argue that a refusal to disqualify class counsel cannot be reviewed effectively after final judgment, apparently on the grounds that reversal after final judgment will not save Petitioners the cost of defense expended in the meantime, and on the further grounds that the ethical impropriety will "fester" in the interim.

The fact that a party may have to continue to defend a case, and incur expense for doing so, because an interlocutory order is erroneous does not make that order a "final decision" for purposes of § 1291. Were that not the case, all interlocutory orders adverse to a defendant would be immediately appealable. Further, to adopt a rule which determines the finality of an order by theamount of its cost to a defendant would require the same *ad hoc* factual evaluations by Circuit Courts which led this Court to reject the "death knell" doctrine in *Coopers & Lybrand v. Livesay*, 437 U.S. 470, 474-77 (1978).

Petitioners concern for the "festering" of Smith, Cohen's "ethical impropriety" is a transparent attempt to bestow "importance" on an issue which has no significance beyond this case. It should be remembered that neither Smith, Cohen's client, First National, nor

any member of the class (after written notice), considered the alleged impropriety sufficient to complain of it, and the District Court considered limited withdrawal by Smith, Cohen a sufficient cure for any apparent impropriety. The only persons who appear aggrieved are Petitioners, whose interests are adverse to the very Plaintiff Class which they seek to "protect" by disqualifying class counsel. The evil seen by Petitioners is simply "an impropriety which exists only in the minds of imaginative lawyers." *Woods v. Covington County Bank*, 537 F.2d 804, 819 (5th Cir. 1976).

Finally, the Fifth Circuit's opinion correctly emphasized the availability of 28 U.S.C. § 1292(b) as an appellate vehicle to review interlocutory orders. Petitioners *had* recourse from the District Court's Order; they could have pursued their appeal under 28 U.S.C. § 1292(b).[5] The Fifth Circuit expressly referred to that remedy, and other Circuit Courts have voiced preference for the use of 28 U.S.C. § 1292(b) or, alternatively, mandamus under the All Writs Act, 28 U.S.C. § 1651, for appeals from orders refusing to disqualify counsel. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Community Broadcasting of Boston, Inc. v. F.C.C.*, 546 F.2d 1022 (D.C. Cir. 1976). *See also The Appealability of Orders Denying Motions for Disqualification of Counsel in Federal Courts*, 45 U. Chi. L. Rev. 450 (1978). Indeed, the Fifth Circuit simply followed the lead of this Court's

[5] The Fifth Circuit likely would have accepted the appeal. In *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978), the Fifth Circuit held that an order refusing to disqualify class counsel was unappealable under § 1291, but accepted a § 1292(b) appeal.

endorsement of § 1292(b) procedure in interlocutory situations. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978).

The availability of interlocutory appeal under 28 U.S.C. § 1292(b) or 28 U.S.C. § 1651 also answers Petitioners' argument that the Courts of Appeal must play a part in the enforcement of ethical standards. If the ethical question is truly "substantial," certification by the District Court and acceptance by the Court of Appeals will follow. In the unlikely event that the District Court refuses certification, direct access to the Court of Appeals is available under 28 U.S.C. § 1651. Even if the Court of Appeals refuses acceptance under 28 U.S.C. § 1292(b) or refuses mandamus under 28 U.S.C. § 1651, it has participated in the review process, and has determined that the ruling at issue lacks substantial importance.

In short, the Fifth Circuit's decision is in accord with *Cohen*, and is correct. The Fifth Circuit simply decided that under the facts of this case, where the District Court has assumed a continuing duty to monitor the efficiency of its order allowing limited withdrawal by Smith, Cohen, the District Court's Order was not conclusive, but was subject to review at any time. Being non-conclusive, the order is not "final" under *Cohen*. The Fifth Circuit's decision is nothing more than a strict application of *Cohen*, and is reflective of this Court's expressed concern that "indiscriminate" *Cohen* appeals would undermine the interlocutory appellate procedure created by Congress in 28 U.S.C. § 1292(b). *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Petitioners could have taken a § 1292(b) appeal, but did not. The error was theirs, not the Fifth Circuit's.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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